

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

W. D. B.

vs.

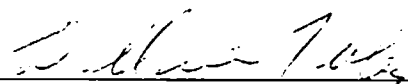
No. 02-30

MEMPHIS CITY SCHOOLS

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FINAL ORDER

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WILLIAM T. AILOR,  
Administrative Law Judge  
AILOR LAW OFFICES  
606 W. Main Street, Suite 202  
(865) 525-9326  
Knoxville, TN 37902

October 22, 2002

## FINAL ORDER

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Case No. 02-30

This cause was heard before William T. Ailor, Administrative Law Judge for the Tennessee State Department of Education of Education, on the 30<sup>th</sup> day of September, 2002, at the Central Offices of the Memphis City Schools in Memphis, Tennessee. Present at the hearing, were Webb Brewer, Esq. and Marcella G. Fletcher, Esq representing the petitioner(s) along with the mother of W. D. B. Representing the school system at the hearing were Ernest Kelly , Esq. along with Mr. Steve Raney, a representative of the school system and the compliance officer for the Memphis City School System. Additionally, the mother requested that Mr. Pepper, a close family friend, be allowed to remain in the room during the proceedings to which all parties agreed.

The parties agreed that residential placement was desirable for this student and stipulated that the issue to be determined by the Court was whether the proposed placement at the Jackson Academy which Memphis City School system proposed is appropriate for the child and if not, what would be an appropriate placement for W. D. B.

### FACTS

This matter concerns a nine year old student in the Memphis City Schools who has been provided special education services since kindergarten in 1999. He has been diagnosed as emotionally disturbed with a secondary disabling condition of speech and language. The student has been in various types of placement including psychological, clinical and home school. Memphis City Schools agreed that residential placement was appropriate for this student and FAPE could be provided at the Jackson Academy in Dixon, Tennessee. The petitioner has

rejected the placement as not being appropriate for the student.

### ARGUMENTS

The petitioner argues that Jackson Academy is a Level III treatment facility just the same as other Level III treatment facilities that this child has been in previously such as Boy's Town where his arm was broken. They further argue that to place him in a facility with children who are older and bigger than he is would pose a great risk to this student contending that "the majority of children at Jackson Academy are teenagers". The petitioner further alleges that the facility does not have psychiatric staff to appropriately provide for this student's medical needs treatment facility.

The respondent argues that after agreeing to residential placement, they reviewed the appropriate options and found Jackson Academy as the only placement available of the options they investigated. They argue that FAPE can be provided in Jackson Academy and that is appropriately staffed to meet this student's psychological and other needs. Additionally, respondent argues that the petitioner's rejection of Jackson Academy is arbitrarily and that any prior incident

### PROOF

The witnesses were sworn and the mother was called as the first witness.

The mother testified that she noticed something different about her son almost immediately, because he did not sleep on a regular schedule, and he exhibited very aggressive behaviors. He charged his sister who was 8 years older than him (P.9, 10) At 4 years old he was diagnosed with disorder - bipolar, not otherwise specified and ADHD combined type with speech problems on the 3<sup>rd</sup> axis (P. 11, L 7-11) She further testified that his current diagnosis is, "bipolar with psychotic features, and we did have Dr. Luchessi I put ADHD back on the form for Ms. Gholson's benefit. He's not qualified for special ed. He's really not ADHD" (P 11, L 24 - P 12, L 4) and that he is on numerous medications. She stated that she thinks current medicines are effective in dealing with

hallucinations. ( P 13, L 12)

This boy has been hospitalized numerous times at such facilities as St. Francis Hospital, Charter Lakeside Behavioral Healthcare, Compass Intervention and LeBonheur. He has had various educational placements including Idlewild Elementary, South Park Elementary and Macon Elementary but is currently not receiving services (P. 47, L 11). Ms. B. testified that she, "was not happy about the things that happened at Macon Elementary." (P.55, L. 17,18) He started at South Park in late November following that. "That wasn't working well and I withdrew him on January 28<sup>th</sup>. .... They put him in home school." (P. 56, L. 20-23) Mr. Craig Nicholson came to the house three times until the end of the school year was over. (P. 60) Extended year services were recommended but W. D. B. went into treatment at Lakeside before the teacher came to the house. Then W. D. B. went to Boy's Town. When the teacher arrived for the home bound, Ms. B. "told her he was already gone & wouldn't be needing that for the summer." (P. 61, L.23) Ms. B. was asked if she desired residential placement. Her response was, "I do, providing it's the appropriate placement." ( P. 62, L. 7, 8)

The mother testified about various times where her son was injured while in the custody of someone else, sometimes in mental health facilities and sometimes in school settings. Most recently, he had received a broken arm at Boy's Town (P. 32, L. 19-22). On cross examination, she testified that she knew that Jackson Academy was not run by Memphis City Schools.(P. 90, L. 16-20) She stated that she wanted him to be safe as a result of previous placements and injuries he had received. (P. 63) She testified that she saw potential harm in a bad placement (P. 89, L. 4 - 6) Ms. B. testified that, "Mrs. Walker, who was the social worker there, looked at some residential facilities... And she found a place that had an open bed and would taken TennCare within the state and it was unacceptable. Q. And what was that place? A. It was Jackson Academy. " (P. 48, L. 8 - 16) When

the mother testified about the information she had with regard to Jackson Academy. she said, "What I really found out about it, I pulled up on-line and it's basically another — just another behavior modification program where, you know, every child has the same program, regardless of their needs, and it's just another Boy's Town. It's just a different county. That's all it is really and truly." (P. 48, L. 22 - P. 49, L. 5) On cross examination, the witness stated that she had not visited the school. (P. 78, L. 19-21) She further stated, "if it was a TennCare facility that actually worked, it would be more than welcome." (P. 84, L. 5-7) She went on to state, "... M. Thompson told me when I gave her a copy of the book and the information that I've collected, that there was not a proper placement for W. D. B. in the State of Tennessee. And we can only base our knowledge on the facts that we are given. (P.84, L. 10 - P 85, L. 17) Mr. Kelly asked, ".... So you're basing your entire objection to Jackson Academy on the conclusion that Ms. Thompson has given you that there is no facility in Tennessee that's appropriate?" Ms. B. answered, "That is what she said." Mr. Kelly then asked, "Okay. So if any other facility in Tennessee were mentioned, then on the basis of that statement, you object to it?" She stated, "Well, have I six or eight right here that I've pulled up, and according to what she said, I'm going on that." When questioned further, "...Your objection to any facility in Tennessee would be the same, but Ms. Thompson says there's not an appropriate facility in the State of Tennessee for your child." Ms. B. responded, "That is correct." (P. 84, L. 18 — P. 85, L. 16)

The next witness called was Ann Thompson who is a certified educational planner or education consultant. She stated that she had no formal education as an education consultant, but she belongs to various professional organizations, attends seminars put on by the organizations and participates in continuing education. She testified that she specializes in boarding schools, colleges and special needs placements. Her specific educational background was in speech pathology. (P.94) When questioned about finding an appropriate placement for a client, Ms. Thompson stated that she

would generate a list of facilities she considers appropriate after taking into consideration various data she collected "trying to take into consideration any parameters that the family would put on the search." (P. 10, L. 1 - 3) "So I formulate a list of options and then contact each school or option for consideration. Again, having had the parent's permission to do this." (P. 106, L. 8-11) She went through the process of finding a proposed placement for W.D.B. When asked what the primary criteria she considered when trying to find a placement for W.D.B., she stated, ".....I reviewed medical history and his situation is not very pertinent to this particular — to his placement." (P. 116, L. 20-22) She further stated, "...I typically ask about, you know, treatment philosophy. I mean, in other words, what type of facility, first of all. Typical clientele, who they treat, age of clients, size of facility, treatment philosophy, length of stay, cost, family involvement and obviously geographics is part to the process as well. And whether or not there is an opening." (P. 117, L. 4-11) Ms. Thompson testified at length about what steps she has taken to find an appropriate placement for W. D. B., and the facilities she has investigated in that regard. She testified about the facilities which sent her information and which she had prepared a summary comparison of which is exhibit 1 in the record.

She was asked about what she knew about Jackson Academy. She testified that she [didn't] "know a lot about it....." (P. 131, L. 12) "I really don't -- I don't know much about Jackson Academy." (P. 138, L. 5, 6) "I've never had a student at Jackson Academy and I just have to plead ignorance about the program" ( P. 140, L. 17 - 21) On cross examination, she was asked, "And you were instructed at the outset by your client not to consider Jackson Academy? A. Huh-uh, no. Q. Okay. A. No. Q. Okay. But you didn't consider Jackson Academy apparently? They were not on your list? A. Right." (P. 148, L. 23 - P. 149, L. 7) She went on to state, "Let me say this: I was not instructed not to look at Jackson Academy. I knew that Jackson Academy had already been looked at and

investigated for this student.---- Q. Okay. A. Okay. I mean, I knew that it had been recommended, so I knew that that option was on the table.” (P. 149, L. 20 - P. 150, L. 3) Q. “Okay. So if I’m understanding you correctly, and tell me if I’m wrong, what you’re testifying is that you didn’t dismiss Jackson Academy as not being appropriate, you just knew it was already being looked into so you were looking into alternatives? A. Right. I did not research Jackson Academy. That’s right. Q. And as far as you know, it’s an appropriate program? A. I don’t know that it’s not.” (P. 150, L. 21 - P. 151, L. 7) When asked if she had informed Ms. B. that Jackson Academy would not be an appropriate placement for W. D. B., Ms. Thompson responded, “No, I didn’t. Q. Nor have you told Ms. B. that there is no appropriate placement within Tennessee? A. She and I — this is the first time she’s heard about the options is today..... But I did not discuss any options with her in Tennessee. Q. But specifically, on my question, you haven’t told her that there’s no Tennessee institution that would be appropriate? A. I have not told her that.” (P. 155, L. 18 - P. 156, L. 13)

Doctor David Goldstein was the next witness called by the petitioner. He has received his undergraduate degree from the University of Florida with his Master’s Degree and Doctoral degree in psychology from the University of Mexico completing a predoctoral fellowship at Yale University. He is a licensed health services provider and clinical psychologist. He testified about W. D. B. and the review of his medical records and the one interview that Dr. Goldstein had with him. The Doctor testified that W. D. B. stated that in his opinion, “I think he needs a place that specializes in psychotic disorders. Particularly children that can be violent toward themselves and others.....” (P. 170, L. 14 - 19) He testified that he did not test this child and that did not do any formal diagnosis but did recommend a residential placement. (P. 176, L. 14 - 22) It should be a place designed for boys who are aggressive, acting out and seriously emotionally ill, children that have problems with reality testing (P. 177, L. 1 - 10)

Mary Stuart was then called to testify. She stated that she has a bachelor's degree in criminal justice and associate's degree from Jackson State Community College; employed at West Tennessee Legal Services since 1999. She also testified about her work experience at Pathways, mental health facility, and as a social worker. Petitioner's attorney asked Ms. Stuart about her experience placing children at Jackson Academy. Her testimony was that most of them had juvenile court involvement, and all of them were teenagers.(P. 193, L.1) None of them was of the age of this child. Ms. Stuart was the petitioner's last witness.

The respondent called Ms. Cynthia Gholson to testify. She is employed by the Memphis City Schools as a certified school psychologist with a Master's degree in child development. She stated that in her search for a proper placement for W. D. B., she visited Jackson Academy two weeks prior to the hearing and found that there are two programs, one for younger students 8 to 12 and one for older adolescent boys. (P. 206, L. 5-8) When she was asked about the staff, she stated, " they have five teachers, two of whom have special education certification. All the children have IEP's. All of them have behavior plans. They have five Master's level therapists, one of whom is identified as the therapist for the younger age group. They have a board certified child and adolescent psychiatrists..... They have a Doctoral level clinical psychologist. They have a rec therapist who is there on the weekends.....just the counselors who supervise the children during the evening."(P. 208, L. 10 - P. 209, L. 3) She later testified, "there is a lot of emphasis and concern for safety, and that's their rational for not allowing the children to interact [with the older children] even for social purposes, is for safety concerns." (P. 210, L. 16 - 21) When asked whether or not Jackson Academy could handle children with violent tendencies, she stated, "I think a lot of children that they work with from what they were telling us, have a history of aggressive acting out. That's not uncommon. On the younger children, several of them had been diagnosed with psychotic disorders...." ( P. 212,



L. 4-8) On follow up questioning about how they were prepared to deal with psychotic disorders and how successful their work was with children with psychotic disorders, Ms. Gholson, testified, “ they have a nurse on 24-7.....And of course, the board certified child and adolescent psychiatrist is the appropriate person to manage and treat a psychotic youngster.....Every indication that we have is that they do, that they have that track record and that they’re currently working with young children who have been diagnosed with psychotic disorders.”(P. 213, L. 8-23) When asked to compare D’s behavior to that of the children she observed at Jackson Academy, Ms. Gholson testified, “I think that W. D.B. needs a lot of intervention, a lot of one-on-one, but I think that [he] could benefit from a placement such as Jackson Academy for a substantial period of time..... , but I see some real advantages to putting him in an extremely structured intervention and letting him benefit from that for a stable period of time....” ( P. 217, L. 6-20)

Ms. Stephanie Ware was the next witness called by the respondent. She testified that she had a Masters degree in secondary education and administrative licensure in special education, that she has been with Memphis City Schools since October 1998, and that she is the program supervisor with the division of exceptional children. She stated that she, “became involved with W. D. B. when he was enrolled at South Park and subsequent suspensions.” (P. 248, L. 22-24) and that she was also the supervisor at Macon school when he was a student there. She stated that she had gone to the Jackson Academy a few weeks prior to the hearing with Ms. Gohlson to observe the facility and spoke with Ms. Springfield there. She stated that she had been involved in the IEP process for W. D. B. When Ms. Ware was questioned about a recommendation she had for this child, she replied, “residential placement at Jackson Academy.” (P. 258, L. 15, 16) When asked why she felt it was a good placement for him, she responded, “well, after meeting the staff of the Academy and seeing the children, there are other children [his] age in the program, which I believe it’s hard to find eight year

old children in residential centers with the same or more severe issues than what [he] has. They had small numbers as far as the younger children were concerned. I believe than had eight children enrolled. The staff that they have is, I mean, above and beyond what we could expect. I mean, they have every opportunity to meet all of his needs.” (P. 258, L. 22 - P. 259, L. 9) The respondent rested at the conclusion of Ms. Ware’s testimony.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After a review of the record, listening to the testimony of the witnesses, the Court having had an opportunity to observe them and weigh and determine their credibility and a review of the exhibits in the record from all of which the Court finds as follows:

This matter involves a nine-year old boy who has severe problems emotionally which manifest in aggressive tendencies. He has been a special education student in the Memphis City Schools since kindergarten in 1999 when he was classified as Emotionally Disturbed with secondary disabilities in the area of speech and language. In his relatively short history as a student with Memphis City Schools, this boy has been in numerous educational and clinical settings which include psychiatric hospitals, mental health facilities both residential and in-patient and others as a result of his behavior problems both at home and at school. Some of his placements have resulted in injuries to this child. His problems appear to stem more from his psychiatric disorder which in turn effects his educational growth and development. His mother has an extensive record of his school and medical experiences in the form of a very large notebook with copies of records which she had with her at the trial. She knows her son’s history very well and as a result of his previous injuries is fearful and skeptical of any placement that the Memphis City Schools proposes that is not private and out of state. She stated that her expert, Ms. Thompson, had advised her that “there was not a proper placement for W.D.B. in the State of Tennessee.” (P. 84, L.10-14) This is clearly not

the case as Ms. Thompson was examined by Mr. Kelly with the following dialogue, "Q. "But you did not tell Ms. B. that Jackson Academy would not be an appropriate placement, did you? A. No. I didn't. Q. Nor have you told Ms. B. that there is no appropriate placement within Tennessee? A. She and I — this is the first time she's heard about the options is today..... But I did not discuss any options with her in Tennessee. Q. But specifically, on my question, you haven't told her that there's no Tennessee institution that would be appropriate? A. I have not told her that." (P. 155. L. 18 - P. 156. L. 13) Ms. B. states that her objection to a facility in Tennessee is that Ms. Thompson said there are no appropriate facilities in Tennessee. (P. 85. L. 11-16) Ms. Thompson had not visited the facility in the past three years and stated that one of her practices was to visit a potential placement for a client of hers. She also admitted that she would take into consideration the "parameters that the family would put on the search". (P. 106. L. 1-3) She did not make any specific recommendations with regard to this child.

Ms. B. testified that the only information she had concerning Jackson Academy was what she found on the internet. (P. 65. L. 8-12) She testified that it was another Level III facility of which she her son had been in three other facilities with the same level system. She stated, "we can only base our knowledge on the facts that we are given." (P. 84. L. 16-17) She made a determination based solely on the basis of what she found on the internet and her previous experiences in other facilities and did not allow her expert to investigate Jackson Academy. As a result, the petitioner did not give the Jackson Academy an opportunity. She had made up her mind about Jackson Academy before she knew anything substantive about it. Ms. Thompson stated that she did not research Jackson Academy and as far as she knew it is not an appropriate placement for W. D. B. (P. 150. L. 21 - P. 515. L. 7) Ms. B. appeared to be an intelligent woman who cares very deeply for her children. However, she seemed to be evasive in responses to questions posed by the respondent's attorney.

Based on all of the above, the Court has to discount her testimony significantly.

Dr. Goldstein, a Ph. D. clinical psychologist, testified that this child “needs a place that specializes in psychotic disorders. Particularly children that can be violent toward themselves and others.....” (P. 170, L. 14 - 19) He goes on to state that “...he’s been traumatized as well. And he’s also going to call and pull that in his behavior from others because of his absolutely provocative behavior, his uninhibited behavior. And given his inability to regulate his thoughts and emotions, any kind of retraumatization is going to feed that process of violence and rage and his preoccupation with it.” (P. 171, L. 3-12) Further, he testified that the facility that this boy is placed in needs to specialize in this kind of disorder (P. 172, L. 6-8) where he can “experience a profound sense of safety and containment” (P. 172, L. 17, 18) When asked from reviewing his records if thought that this student had been in that environment, he stated, “...not enough — not long enough. Not of long enough duration, quite frankly. I mean, you know, no.” (P. 172, L. 21 - 23) He did not testify about the Jackson Academy. Based on the testimony of those who had investigated Jackson Academy, it does have the appropriate personnel for this child’s needs.

Ms. Stuart’s testimony was not of much help as her involvement with the Jackson Academy has been for older boys most of whom have been processed through the juvenile court system and her last placement there was in October 2000.

The testimony of Ms. Gholson showed that she had visited the Jackson Academy two weeks prior to the hearing and found it to be a suitable facility for this boy based on her knowledge of him and his record as well as the make up of the age group this student would be interacting with. She stated that they had worked well with children with psychotic disorders and testified to a success story related to her from the staff at Jackson Academy.

Ms. Stephanie Ware also had visited the facility in question and recommended it based on

her history with W. D. B.

The issue before this Court is whether the Jackson Academy is appropriate for W. D. B. The law is clear under *Bd. Of Education v. Rowley*, 458 U. S. 176, 206-07 (1982) the Court must first ask whether the school district complied with the procedural safeguards set forth under IDEA. Next, the Court must find that a placement is designed to provide meaningful educational benefit. The petitioners argue that because this child has been in at least three Level III treatment facilities in the past which has resulted in injury to this child, that to place him in the Jackson Academy which is another Level III treatment facility would put him at great risk. They further that this facility does not have the psychiatric staff to monitor this student's medication needs. As none of the petitioner's witnesses never visited the Jackson Academy they apparently did not know about the Child psychiatrist and nurse. With regard to their argument that to put him with other boys bigger and older than he is does not stand as he will be in a separate section of the facility from the children much older than he is and is basically a similar make up to the proposed placements proposed Ms. Thompson. There has been no testimony that the younger children in the separate section have been processed through the juvenile system and therefore pose any more of a risk than any children in any of the other facilities that Ms. Thompson testified about.

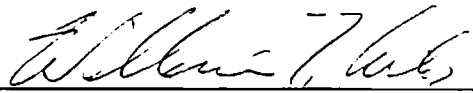
This matter is not about a Cadillac vs. a Chevrolet. It is about what this child needs and whether or not the placement proposed by the Memphis City Schools can appropriately provide FAPE. Even Dr. Goldstein and Ms. Thompson failed to testify that the Jackson Academy was not appropriate for W. D. B., and that he needed to be in a place where they dealt with psychotic disorders. Dr. Goldstein testified that he needed to be in a facility where he felt a profound sense of safety and containment, and he had not been in that environment long enough. He could not testify that this child had not been in that kind of environment or that the Jackson Academy could

not provide that.

From all of the above, the Court finds that the petitioner has not carried her burden, and the Jackson Academy is an appropriate placement for W. D. B. and the complaint of the petitioner is dismissed.

IT IS HEREBY ORDERED the petitioner's complaint be dismissed and the placement proposed by the Memphis City Schools is an appropriate placement for this child.

ENTER this the 22<sup>nd</sup> day of October, 2002.

  
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WILLIAM T. AILOR  
Administrative Law Judge

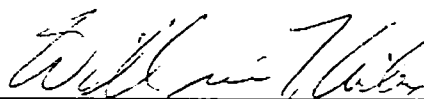
Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of Education chooses not to appeal), the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this order.

### CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed in the U. S. Mail. with sufficient postage affixed thereto, to Bill Ward, Staff Attorney, State of Tennessee Department of Education, 5<sup>th</sup> Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN 37243, Ernest Kelly, Esq., attorney for school system, 81 Monroe, Memphis, TN. 38103 and [redacted], Memphis, TN. 38103, and Marcella Fletcher, Esq., PO Box 12256 Jackson, TN. 38308. attorneys for Parent, and on this the 23<sup>rd</sup> day of October, 2002.



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WILLIAM T. AILOR